

1 UNITED STATES BANKRUPTCY COURT  
2 DISTRICT OF DELAWARE  
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5 In re: :  
: Chapter 11  
6 :  
W.R. GRACE & CO., et al., : Case No. 01-01139 (KJC)  
7 :  
Reorganized Debtors. : (Jointly Administered)  
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9 Ralph Hutt and Carl Osborn, :  
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10 Plaintiffs, :  
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:  
11 v. : Adv. Proc. No. 14-50867  
: (KJC)  
12 Maryland Casualty Company :  
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13 Defendants. :  
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14 :  
Continental Casualty Company :  
15 Transportation Insurance :  
Company :  
16 :  
Plaintiffs, :  
17 :  
v. : Adv. Proc. No. 15-50766  
18 : (KJC)  
Jeremy B. Carr, Juliet L. :  
19 Gifford, Gloria G. Harris, :  
Joyce I. Lundvall, Edward :  
20 D. Stefanatz, Fred O. Bache :  
Jack L. Jensen, Melba C. :  
21 Weston, Ruby R. Hagner, Kerry :  
L. Beasley, William G. :  
22 Corbett, Amanda K. Foss, :  
Tammy Sue Lang, William E. :  
23 DeShazer, Johnny G. Jellesed, :  
Lorraine B. Sichting, Martin :  
24 H. Krebs, Kenneth B. :  
Neubauer, Brenda L. Vinson, :  
25 Laurie A. Waller, Shirline E. :

1 Almeida, Iganacio C. Almeida, :  
Thomas F. Erickson, Russell :  
2 S. Barnes, Sandra L. Barnes, :  
Phyllis A. Haugen, and Dennis :  
3 L. Welch, :  
:  
4 Defendants. :  
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9 United States Bankruptcy Court

10 824 North Market Street

11 Wilmington, Delaware

12 November 24, 2015

13 1:15 PM - 3:03 PM

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21 B E F O R E :

22 HON KEVIN J. CAREY

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO OPERATOR: AL LUGANO

1 HEARING re Debtors' Objection to the Proof of Claim Filed by  
2 Norfolk Southern Railway Company [Filed: 7/20/09] (Docket  
3 No. 22553)

4  
5 HEARING re Notice of Completion of Briefing Regarding  
6 Plaintiff's Motion for Summary Judgment [Filed: 10/25/15]  
7 (Adv. Pro. No.: 14-50867, Docket No. 31) filed by Ralph Hutt  
8 and Carl Osborn.

9  
10 HEARING re Notice of Completion of Briefing Regarding  
11 Defendants' Motion to Dismiss Adversary Proceeding [Filed:  
12 11/4/15] (Adv. Pro. No.: 15-50766, Docket No. 26) filed by  
13 Jeremy B. Carr, et al.,.

14  
15 HEARING re Motion of the WRG Asbestos PI Trust for Leave to  
16 File Amicus Curiae Brief in Support of Continental Casualty  
17 Company and Transportation Insurance Company [Filed:  
18 11/17/15] (Adv. Pro. No.: 15-50766, Docket No. 27)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 ANDERSON KILL, P.C.

4 Attorney for Proposed WRG Asbestos PI Trust

5

6 BY: ROBERT M. HORKOVICH

7

8 CONNOLLY GALLAGHER, LLP

9 Attorney for Maryland Casualty

10

11 BY: JEFFREY C. WISLER

12

13 ECKERT SEAMANS

14 Attorney for Maryland Casualty

15

16 BY: EDWARD J. LONGOSZ, II

17

18 PASCHULSKI STANG ZIEHL & JONES

19 Attorney for W.R. Grace & Co.

20

21 BY: JAMES O'NEILL

22

23

24

25

1 GOODWIN PROCTER LLP

2 Attorney for CNA

3

4 BY: MICHAEL S. GIANNOTTO

5

6 FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.

7 Attorney for CNA

8

9 BY: ELIZABETH M. DECRISTOFARO

10

11 CAMPBELL & LEVINE

12 Attorney for WRG Asbestos PI Trust

13

14 BY: MARK T. HURFORD

15

16 MURTHA CULLINA LLP

17 Attorney for Libby Claimants

18

19 BY: DANIEL C. COHN

20

21 GELLERT SCALI BUSENKELL & BROWN

22 Attorney for Libby Claimants

23

24 BY: MICHAEL BUSENKELL

25

1 BAYARD, PA

2 Attorney for CNA

3  
4 BY: SCOTT D. COUSINS

5  
6 ALSO PRESENT TELEPHONICALLY:

7  
8 RYAN M. HEHNER, KIRKLAND & ELLIS

9 ROGER HIGGINS, THE LAW OFFICES OF ROGER HIGGINS LLC

10 ALAN B. RICH, LAW OFFICE OF ALAN B. RICH

11 RICHARD WYRON, FRANKEL WYRON LLP

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P R O C E E D I N G S

THE COURT: Good afternoon, everyone.

MR. COHN: Good afternoon, Your Honor.

THE COURT: Let's get this party started.

MR. COHN: Good afternoon, Your Honor. My name is Daniel Cohn. I represent the Montana plaintiffs in the adversary proceedings that both concern CNA, which is seated here at this table, Your Honor, and then Maryland Casualty Company, which I'll sometimes call MCC, which is seated at this table.

The agenda puts MCC, the MCC matter first and then CNA and in order to avoid repetition because there's lots of --

THE COURT: I was hoping you were going to say something like that. Go ahead.

MR. COHN: Counsel has agreed on a way to proceed, which we hope that you all accept. The first is that any argument that anybody makes regarding CNA or MCC will apply to both so that counsel don't need to reserve rights or repeat arguments.

And then secondly, while the MCC matter will be handled first, and I'll go first because it's my motion for summary judgment, Mr. Giannotto for CNA will hold his fire until we get to CNA, which will be the second matter on the agenda and at that time he'll go first because I'll have had

1 my say with MCC. I'll have presented my argument. Mr.  
2 Longose will have replied. I'll have had my rebuttal and  
3 then at that point when we get to CNA it'll be up to Mr.  
4 Giannotto to say whatever additional he feels needs to be  
5 said on behalf of CNA and then I'll respond to him.

6 THE COURT: All right.

7 MR. COHN: So the other thing that we agreed, Your  
8 Honor, between the Montana plaintiffs and CNA is for me to  
9 just make it clear that the "only" objection that we have to  
10 the declaratory judgment -- I put only in quotes -- the  
11 "only" objection that we have to the declaratory judgment  
12 sought by CNA is that it is substantively incorrect. That  
13 is to say that while they want a declaration saying that the  
14 channeling injunction bars the Montana plaintiff's claims,  
15 we want the opposite declaration.

16 But apart from that, we have no argument or are  
17 making none that the declaratory judgment complaint is in  
18 any way inadequately planned.

19 THE COURT: All right. Thank you. Anything else  
20 preliminarily? I hear no response. Okay. How much time do  
21 the parties expect that they will consume today?

22 MR. COHN: Your Honor, it depends on how many  
23 questions you have. I've -- my estimate is that the two  
24 hours that appear to be allocated on the agenda were  
25 probably going to be just about right.



1 THE COURT: Let's move forward then.

2 MR. COHN: All right. So we're starting off then  
3 with the MCC matter, and not -- the Montana plaintiffs are  
4 Ralph Hutt and Carl Osborn. Each of them worked at Grace's  
5 Mine and Mill in the area of Libby, Montana, which the  
6 parties will tend to call the mine. And they did so during  
7 a period when Maryland Casualty Company provided insurance  
8 to Grace and also provided industrial hygiene services at  
9 the mine and we're not just talking about an annual  
10 walkthrough where you, you know, take a look at the plant,  
11 go out for a nice lunch in Libby. We're talking about as  
12 alleged in the proposed complaint against MCC. We're  
13 talking about a pervasive involvement in industrial hygiene,  
14 including designing a dust control system. You'll see  
15 documents attached to the complaint referring to specific x-  
16 rays concerning specific workers, including Mr. Hutt, by the  
17 way.

18 And so what we are alleging, Your Honor, is not  
19 simply an occasional inspection but rather pervasive  
20 involvement with the industrial hygiene system resulting in  
21 a negligence claim because we assert that the industrial  
22 hygiene system was inadequate, even under the standards of  
23 the time, to protect the Montana plaintiffs from harm from  
24 the asbestos dust that pervaded the mine.

25 And in addition, Your Honor, we accuse MCC of

1 knowing about and suppressing information concerning the  
2 dangers of asbestos so that our clients were unable to take  
3 steps to protect themselves. That is the negligence claim.

4 And then in addition against MCC, we stated a  
5 claim for bad faith. One of the forms of insurance that MCC  
6 provided was worker's comp insurance and the bad faith claim  
7 says that in its capacity as worker's comp insurer, MCC  
8 breached a duty to our clients by withholding information on  
9 the dangers of asbestos so as to prevent them from filing a  
10 claim for worker's compensation benefits at a time when such  
11 a claim would be timely, so that's the bad faith claim,  
12 which is the second of the two claims that we seek to bring  
13 against MCC.

14 Now, Mr. Hutt and Mr. Osborn suffered terribly  
15 from asbestos disease and of course they have claims against  
16 Grace but these claims have been discharged under Grace's  
17 Chapter 11 plan and they're not at issue -- the claims  
18 against Grace are not at issue in this adversary proceeding.  
19 Those claims will -- have been or will be filed against the  
20 trust but the trust is paying claims in fractional dollars  
21 and right now it's at about 25 percent.

22 So what's at issue here today, Your Honor, in  
23 terms of both MCC and CNA is the claims against the  
24 insurance under Montana law for the insurer's own alleged  
25 wrongdoing.

1 Now, what I'd like to do, Your Honor, in case it  
2 would be helpful, is to hand you up the statute, Section  
3 524(g) with a couple of sections highlighted.

4 THE COURT: Okay.

5 MR. COHN: Thank you. Oh, and other counsel in  
6 the courtroom already have this.

7 THE COURT: I assume given the nature of the  
8 dispute that they would.

9 MR. COHN: Well, not only have they read the  
10 statute many times but they have this specific handout, Your  
11 Honor, the one with the highlighted.

12 So under the statutory language, Your Honor -- and  
13 this really appears down at the bottom of the second page.  
14 In order to be barred by the chair of the injunction, a  
15 claim would have to meet two expressed requirements under  
16 the statute.

17 The first of them, down at the bottom under  
18 4(a)(2) is that the third party -- that would be the insurer  
19 - must be alleged to be directly or indirectly liable for  
20 the conduct of claims against or demands on the debtor. In  
21 that little separator thing, that black mark, that's mine.  
22 That's not in the statute. But then that leads to the  
23 second of the requirements which is that the alleged  
24 liability of the insurer must arise by reason of the third  
25 party's provision of insurance to the debtor. So those are

1 the two separate and distinct statutory requirements for a  
2 third party to be eligible for protection under the Grace  
3 channeling injunction.

4 And at the outset I should say, Your Honor, as I  
5 know you know from our briefs, that the Grace channeling  
6 injunction expressly incorporates the terms of the statute  
7 so that to the extent that a claim cannot be adjoined under  
8 the statute, it is not adjoined and Grace does not purport  
9 to have adjoined it under the Grace plan. So for that  
10 reason, we start off, Your Honor, with the two statutory  
11 requirements.

12 I'm first, Your Honor, going to deal with the  
13 provision of insurance because that's the one where there  
14 actually seems to be some authority in the form of a couple  
15 of Second Circuit decisions that have actually considered  
16 the issue.

17 And the first of these was Manville, the branch of  
18 Manville that will be called Manville 3.

19 THE COURT: Mr. Cohn, you'll have to forgive me.  
20 I've kind of a family situation going on at the same time,  
21 so I have to take a break for a phone call.

22 MR. COHN: Of course.

23 THE COURT: But I hope to be back shortly. Stand  
24 in recess.

25 (Recess)

1 CLERK: All rise. Be seated, please.

2 THE COURT: Okay. Sorry to interrupt your mojo.

3 MR. COHN: No, no, of course not, Your Honor.

4 This is for your benefit, so I hope you will feel free to  
5 interrupt.

6 THE COURT: You have my full attention.

7 MR. COHN: Okay. That's cool. All right. So,  
8 Your Honor, you'll recall we were just starting on the  
9 statutes.

10 THE COURT: Two requirements, got them both.

11 MR. COHN: Yep, two requirements. One is that it  
12 be for the liability of the third party would have to be for  
13 the conduct to offer claims against Grace and the other one,  
14 which I'm going to deal with first, is that it has to be by  
15 reason of the provision of insurance.

16 So on that issue of by reason of the provision of  
17 insurance, there are actually two Second Circuit cases that  
18 shed important light on this issue. The first of them --

19 THE COURT: Of course, we're in the Third Circuit,  
20 right?

21 MR. COHN: Well, yes, Your Honor. We can, of  
22 course, completely ignore the Second Circuit but, in fact,  
23 the decisions are so well-reasoned, Your Honor, that I'm  
24 sure you will decide that they should be adopted in an  
25 honorary sort of way as Third Circuit law.

1           So in the case of Manville 3, Your Honor, that was  
2           a grant obviously in the Johns-Manville bankruptcy. What  
3           happened was that there were various plaintiffs who were  
4           bringing suit against one of the insurance companies for  
5           what they, as the Montana plaintiffs sit here, what they  
6           said was that the insurer's own wrongdoing, not its  
7           insurance liability to Manville, which had been settled  
8           under the Manville plan and claims based on the insurance  
9           policies had been adjoined.

10           So the insurer, of course, responded no, no, no, I  
11           think that the injunction that was issued in connection with  
12           the plan harbors everything, including my own wrongdoing, if  
13           there is such.

14           So that issue was considered by the Second Circuit  
15           and the Second Circuit said that, no, these claims, even  
16           though factually related to the Manville bankruptcy -- I  
17           mean, they were claims such as you didn't disclose the  
18           dangers of asbestos and Travelers, the insurance company,  
19           said, well, yeah. Everything we learned about asbestos we  
20           learned from Manville.

21           Despite that pervasive factual connection which  
22           was the subject of a very extensive factual findings by  
23           Judge Lifland in the bankruptcy court, despite that, the  
24           Second Circuit said, no, it's not the factual nexus that  
25           counts. What counts is legal nexus. The fact that you, the

1 basis of liability asserted against the insurer is the  
2 insurer's own misconduct. And, by the way, I hope Your  
3 Honor will insert the word alleged whenever I say this  
4 because I'm really not presuming that either Travelers or  
5 MCC or CNA are to be judged liable on claims in this court.  
6 But so at this point, all liability is alleged.

7 So having said that, Your Honor, the claims were  
8 that Travelers breached its own legal duties to the  
9 plaintiffs and the Second Circuit said that is what matters.  
10 What matters is that the -- if it's a separate basis for  
11 legal liability against the insurers, then the bankruptcy  
12 court does not have jurisdiction to adjoin those claims or,  
13 rather, bankruptcy court didn't have jurisdiction and we  
14 would construe its injunction if we look at it now to have  
15 been intended to be in the court's jurisdiction. And so  
16 they said that the claims against Travelers could proceed.

17 And that's the case that got reversed by the  
18 Supreme Court in the Travelers against Bailey decision on  
19 res judicata counts where the Second Circuit said no, no,  
20 no, the time to have challenged the scope of injunction was  
21 back when it was entered. But that holding as to res  
22 judicata did not apply to anyone who hadn't been given  
23 notice of the original injunction proceeding and there were  
24 such parties and they went back to the Second Circuit and  
25 that's Manville 4.

1           In Manville 4, the Second Circuit, yeah -- said,  
2       yeah, we really meant it in Manville 3. As to anybody who's  
3       not bound by res judicata there is an issue in this case of  
4       a bankruptcy court jurisdiction -- it would be beyond the  
5       bankruptcy court's jurisdiction to simply say that because  
6       it has to do with Manville's asbestos, that, therefore,  
7       third parties can be protected from liability.

8           You can protect them for their liability under  
9       Manville's insurance policies and it should and did. But to  
10      the extent they have their own independent liability, we  
11      don't have jurisdiction to adjoin. And then the court said,  
12      this is in dictum because Section 544(g) had been acted but  
13      was not applicable to Manville. The court in dictum said  
14      and the result will be the same under section 524(g) where  
15      the issue is not jurisdiction but rather construction of the  
16      statute and the court said the proper construction of that  
17      statute would be that you would need to have -- that factual  
18      nexus is insufficient to bring it within the scope of an  
19      injunction. If there is a separate ground for legal  
20      liability on the insurer's part, then it's not adjoined.

21           So then you have the Quigley case and Quigley was  
22      a Section 524(g) case. It didn't involve provision of  
23      insurance. It involved one of those other -- the other  
24      three statutory relationships that is in the same block of  
25      type, if you will, of statute. And so it's equally



1 applicable to the provision of insurance.

2 And so here, the court in an actually holding, not  
3 dictum, said the same thing, said the standard is whether  
4 there is legal liability. If there is a separate basis for  
5 legal liability of the insurer other than, excuse me in that  
6 case, of the corporate parent, then the claim cannot be  
7 adjoined and it doesn't matter how factually or latent it  
8 is, it doesn't matter that it was the debtor's asbestos that  
9 gave rise to the injuries for which the plaintiffs were  
10 seeking recovery. If there's a separate, legal basis for  
11 them to recovery from, in that case, the corporate parent,  
12 then they can do so.

13 And what happened in Quigley was that Pfizer had  
14 bought Quigley and marketed as Quigley's Asbestos under  
15 Pfizer's name and there was a statute. I think it was  
16 Pennsylvania but applicable state law was that if you mark  
17 that product under your own name then you're liable for it.  
18 And the judge, the Second Circuit said, well, yeah, that's  
19 the basis of your liability. The basis of your liability is  
20 not that you're the corporate parent of the debtor. And so  
21 this would not be a claim that rose against you, Pfizer, by  
22 reason of your being the corporate parent of the debtor.

23 And that was despite the fact that it was obvious  
24 and nobody was contesting the fact that it was a factual  
25 matter. Pfizer marketed the asbestos the way that it did

1 solely because it was the corporate parent of the debtor and  
2 it was the debtor's asbestos. Pfizer had nothing to do with  
3 the, you know, with the manufacturer of the product.

4 And so here the application of this principle is  
5 obvious. The fact that it's Grace's asbestos is not what's  
6 important. What's important is that there's a separate  
7 basis for the liability of the insurers other than their  
8 provision of insurance to Grace. So, yes, the injunction in  
9 the most complete possible way protects the insurers from  
10 any future liability under their insurance policies.

11 But to the extent that they engaged in conduct  
12 which was tortious as to the Montana plaintiffs, they are  
13 outside the permissible scope of the second 524(g)  
14 injunction. So that's -- and that's the provision of  
15 insurance branch of the statute.

16 Separately, Your Honor, we argue that just based  
17 on the statutory structure and language the application of  
18 this injunction to our claims would also flunk the other  
19 statutory test, which is that the liability of the insurers  
20 would have to be for the conduct of or claims against Grace.

21 And to understand that claim, Your Honor, the  
22 starting point is the structure of the statute itself. All  
23 that I've talked about so far is Section 524(g)(4) because  
24 that's the part of the statute that pertains to the  
25 protection the channeling injunction may afford to third

1 parties, such as the insurers.

2 Section 524(g)(2) pertains to the protection that  
3 a channeling injunction affords the debtor and that standard  
4 is much broader than the standard that we have in Section  
5 524(g)(4).

6 If you look at the language I highlighted in the  
7 chalk that I've handed up, Your Honor, the -- Grace can be  
8 protected, can and is protected under the channeling  
9 injunction. From personal injury, wrongful death or  
10 property damage actions, seeking recovery for damages  
11 allegedly caused by the presence of or exposure to asbestos  
12 or asbestos-containing products, okay. That's Grace's  
13 protection. It's totally in relation to asbestos.

14 By contrast, Your Honor, Section 524(g)(4)  
15 contains a narrow standard which is that is a third party  
16 liable for the conduct of or claims against Grace? So the  
17 very language of the statute we seem to distinguish between  
18 conduct of Grace versus conduct of the insurer, liability of  
19 Grace versus liability of the insurer.

20 So the other -- excuse me just a second. All  
21 right. So the other thing that we should focus on with  
22 respect to 524(g)(4) are the words of the statute itself.  
23 And so when you see those words that you have to be -- the  
24 third party has to be liable for the claims against -- I'm  
25 sorry, the conduct offer claims against Grace, it's worth

1 asking, well, what would it -- what would it mean if Grace  
2 were not liable?

3 So that when you look at each of the four  
4 categories of the -- of liability and you say, you know, can  
5 there be a claim against the person without there being a  
6 claim against -- I'm sorry, let me just go back and reset,  
7 if I may, Your Honor.

8 All right. So the conduct offer claims against  
9 debtor applies to all four of the categories of the  
10 statutory relationship, so it's provision of insurance but  
11 it's also the corporate parent. It's also being a manager  
12 of a corporation. It's also having to do with corporate  
13 financing. Those are the statutory relationships.

14 And if you consider -- if you now consider those  
15 other statutory relationships, they shed some light on what  
16 provision of insurance means so that, for example, as a  
17 corporate parent you can be -- a channeling injunction can  
18 protect you from claims for piercing the corporate veil, for  
19 example.

20 And so when you think about a corporate veil  
21 claim, no matter how sloppy the parties were about observing  
22 the corporate formalities, about keeping them operating  
23 separately and so on, there can still be no claim against  
24 the corporate parent unless there's a claim against the  
25 debtor subsidiary. If a claim against the debtor subsidiary

1       were to go away, there's no veil piercing claim against the  
2       corporate parent. And so that's -- that, as the statutory  
3       language indicates, there'd be no claim against the  
4       corporate parent for the conduct offer claims against Grace  
5       if it were Grace's corporate parent unless Grace has  
6       liability. That's just a prerequisite for the statute to  
7       work.

8               And the same would be for let's say you're a  
9       manager of the debtor and you go out and you incur liability  
10      on the debtor's behalf and somebody says you're personally  
11      liable. Okay.

12             So now what happens if it turns out there isn't a  
13      claim against Grace? Well, the answer is you're not liable.  
14      There can't be a claim against you for tortious conduct on  
15      behalf of the corporation unless there's a claim against the  
16      corporation. Totally different in the case of our claims  
17      against these insurers.

18             There is no act of conduct -- there is no conduct  
19      offer claim against Grace on which our claim depends. If  
20      there's no conduct offer or claims against Grace, we still  
21      have a claim against these insurers for their own misconduct  
22      because we're stating a separate basis of tort liability  
23      against these insurers.

24             And so just under the language of the statute  
25      itself, it is clear that the statute cannot apply to this

1 kind of separate liability which is for the conduct of the  
2 insurers and claims against the insurers rather than the  
3 conduct offer claims against Grace.

4 Now, in addition to the arguments related to pure  
5 construction of the statutes, Your Honor, there are several  
6 alternative arguments that we advance.

7 Based on not the concession, as my brother likes  
8 to actually call it, but suppose we were to assume that he's  
9 right that these claims of the Montana plaintiffs against  
10 the insurers do arise by reason of the provision of worker's  
11 compensation insurance, so let's just say they were right on  
12 that because you accepted that the factual (indiscernible)  
13 was sufficient even though as argued just a few minutes ago  
14 the -- being Grace's insurer was not a legal element of the  
15 claim.

16 So let's say you accepted that position. The  
17 result would be the same, which is that this channeling  
18 injunction is not going to bar the Montana plaintiff's  
19 claims against the insurers. And there are three arguments  
20 in this regard, Your Honor.

21 The first is that in the 3rd Circuit -- but really  
22 it's based on Supreme Court law, so it just happens that the  
23 3rd Circuit referred to this recently in the (indiscernible)  
24 case -- but there is a presumption against redemption of  
25 state laws pertaining to police powers regarding health and

1 safety. And the worker's compensation scheme is just such a  
2 state exercise of police power regarding health and safety.

3 And in federal and local, by the way, Your Honor,  
4 you know, the section that was being referred to as being  
5 not capable of preempting a state statutory scheme was  
6 Section 1123(a)(3) which has to do with what -- I'm sorry,  
7 1123(a) which has to do with what provisions shall be  
8 included in a plan, what a plan can do, and that section  
9 starts off with "Notwithstanding any contrary law".

10 So but despite that, the 3rd Circuit said, no, no,  
11 no, no. If it's Section 1123(a) versus a state statutory  
12 scheme concerning for the regulation of health and safety,  
13 there is a presumption that the bankruptcy code does not  
14 preempt that statutory scheme. So the way they want to have  
15 it is that these claims are so closely related to worker's  
16 compensation and worker's compensation insurance that they  
17 have, therefore, provision of insurance within the meaning  
18 of the statute. Then, fine. The statute, however, cannot  
19 be construed to preempt the state statutory scheme regarding  
20 worker's compensation.

21 And there's an actual 1st Circuit bankruptcy  
22 appellate panel case that deals specifically with worker's  
23 compensation and holds that worker's compensation is a type  
24 of state statutory scheme regarding health and safety that  
25 cannot be preempted by the bankruptcy code.

1 Now, there are two ways to get there, Your Honor.  
2 One would just be the sledgehammer approach where you just  
3 say, okay, therefore, I'm just going to graft an exception  
4 onto Section 524(g)(4) which says that worker's compensation  
5 is excluded from all of this. And I want to point out that  
6 that would do no harm whatsoever to the purpose the statute  
7 is meant to serve, which is to promote settlements with at  
8 least the (indiscernible) provision. It's designed to  
9 insure that. We promote settlements of insurance policies  
10 in Chapter 11 cases and the reason is because worker's  
11 compensation policies cannot be settled.

12 There's a statutory obligation for any debtor to -  
13 - in fact, for any company -- to have worker's compensation  
14 coverage. If you settle one policy you just have to buy  
15 another. The claims have to be covered and it's very clear  
16 that the Grace plan and every other one that I'm familiar  
17 with just carves those out and doesn't try to -- doesn't try  
18 to settle worker's compensation coverage and, indeed,  
19 expressly reserves it so as to -- well, essentially because  
20 there's nothing to be gained by going through the exercise  
21 that you go through with liability insurers where you go to  
22 the insurer and say if you wanted an injunction that  
23 protects you from any future plans under these policies,  
24 write us a check for, you know, the estimated risk adjusted  
25 value of the policy.



1           So since that -- since worker's compensation  
2     insurance doesn't -- would add nothing to the pot available  
3     for claimants in any event, then there's really no harm if  
4     you simply apply the presumption against preemption so as to  
5     take worker's compensation insurance out of the statutory  
6     scheme.

7           I would point out, however, that there is a way to  
8     construe the statute itself or (indiscernible) the statute  
9     to accomplish that same result. Worker's compensation  
10    insurance, although it's called, you know, insurance and  
11    it's bought by -- in this case it was bought by Grace --  
12    what it insures are claims that are for state mandated  
13    benefits as opposed to Grace's liability. In fact, the  
14    whole purpose of the statutory scheme is that instead of --  
15    is that you take away the liability of the employer and you  
16    say we're going to substitute this worker's compensation  
17    scheme, which pays fixed amounts to workers for various  
18    types of injuries so that on that basis one could say that  
19    what is not -- that worker's compensation does not pertain  
20    to conduct of or liability of Grace. That's one way to get  
21    there.

22           Another way to get there is to say that it doesn't  
23    fall within the warrants of the statute that say it has to  
24    be by reason of the provision of insurance to Grace. Under  
25    the Montana Statutory Scheme -- the language is in our brief

1 -- under the Montana Statutory Scheme, the insurer is  
2 directly and primarily liable to the claimant, the worker's  
3 compensation claimant.

4 So one way of viewing worker's compensation  
5 insurance is that it is not insurance to Grace, not  
6 insurance to the debtor even in the words of the statute but  
7 rather is insurance to the workers for their state mandated  
8 benefits. So that's another way of getting to the same  
9 result. It's a -- I'll acknowledge, Your Honor, it's not  
10 the strongest statutory construction argument that one could  
11 make but when you match that up with the mandate of the 3rd  
12 Circuit to enforce this presumption against preemption, it  
13 is a way to get there that's perhaps gentler than simply  
14 saying we're going to just overrule the words of the  
15 statute.

16 All right. Then, Your Honor, we come to the words  
17 of the plan itself and the plan itself, as you know in a  
18 gigantic case like that, the People labored over the  
19 language of the plan and we can presume that they said what  
20 they meant to say in regard to the plan.

21 And so when you track through the definitions,  
22 Your Honor, and, once again, I -- rather than walk through  
23 it definition by definition right now, what I'm just going  
24 to do is to read you the language of the definitions with  
25 ellipses put in to take away irrelevant material and what

1     you have is an expressed exclusion from the injunction for  
2     rights or obligations that pertain solely to coverage for  
3     benefits under worker's compensation system, rights or  
4     obligations that pertain to coverage -- pertain to worker's  
5     compensation coverage. That's what's excluded.

6             So there's a certain paradox to I would say, or  
7     the inconsistency, really, in the insurer's argument where  
8     they say on one hand these claims should be adjoined within  
9     the statute because they have to do with provision of  
10    worker's compensation insurance but then they turn the Grace  
11    plan and say but they're not picked up by the language that  
12    says they pertain to worker's compensation coverage? If  
13    it's a right or an obligation that pertains to worker's  
14    compensation coverage, then it is excluded by the expressed  
15    terms of the Grace plan.

16            So whether you get there under the statute where  
17    it isn't provisioned insurance at all or whether you get  
18    there because there's an expressed exclusion for rights or  
19    obligations pertaining to worker's compensation insurance in  
20    the plan, it all reaches the same place, which is that --

21            THE COURT: Is it logical or rational to assume  
22    that the plan drafters and -- while I wasn't involved, I  
23    would presume that you were correct there were many hands in  
24    it.

25            MR. COHN: Yeah.

1           THE COURT: Expected that claims arising out of I  
2           guess to put the rabbit in the hat, asbestos-related claims  
3           were to be carved out of any protection that the insurers  
4           were otherwise provided? Do you think anybody would have  
5           intended that really?

6           MR. COHN: Oh yes. Oh yes. Absolutely, Your  
7           Honor, because even the insurers acknowledge that if you're  
8           talking about claims that are statutory, worker's  
9           compensation benefits, four people who were injured by  
10          asbestos, by Grace's asbestos, that is carved out. And the  
11          sole debate is -- that we have under the language of the  
12          plan -- is whether it -- well, whether the words mean what  
13          they say when they don't just talk about excluding worker's  
14          compensation claims but it talks about excluding rights or  
15          obligations that pertain to worker's compensation coverage.

16          When I see that language and I say that the plan  
17          carves that out, too. And Grace, by the way, remembering  
18          that Grace -- well, first of all, the insurers objected to  
19          the plan. So the insurers, whoever had a hand in drafting  
20          it -- and I'm not speaking, by the way, from knowledge. I  
21          have no idea whether their input was solicited but they were  
22          adversaries in terms of the plan process. And so, in fact,  
23          they may not have been consulted.

24          But the real point here is that from Grace's  
25          perspective -- remember, this is all about what Grace, the

1 protection that Grace wants for itself and to accomplish its  
2 goal in the Chapter 11 of maximizing the insurance proceeds  
3 that are available to pay asbestos claims.

4 In terms of serving Grace's goals, Grace had  
5 absolutely no reason to care whether we had these claims,  
6 you know, on the side, if you will, based on worker's  
7 compensation coverage or, for that matter, you know, claims  
8 on the side, as it were, you know, for insurer's own  
9 liability not related to worker's compensation coverage.  
10 That would not diminish the amount that Grace could get or  
11 that ultimately the asbestos PI trust would get.

12 And so, therefore, you know, therefore, Grace had  
13 no reason to care other than, as we'll get to when we talk  
14 about CNA, remember, there was that CNA -- the settlement  
15 with CNA which contained a kind of funky provision whereby  
16 CNA tried to make it cost the trust something if it walked  
17 on this issue of independent liability. But that was  
18 something that the parties sort of -- that the parties  
19 invented as part of their settlement to create financial  
20 incentive that they could then kind of argue to this court.  
21 But we'll talk about that some more, Your Honor, in the CNA  
22 branch of the argument. I'm really trying to respect our  
23 attempt to go in sequence here.

24 So I've been talking about thus far -- I've been  
25 making my argument in respect of the negligence claim, and I

1 wanted to just say that everything I said about the  
2 negligence claim also applies to the bad faith claim the  
3 Montana plaintiffs are bringing, except for there are two  
4 important distinction, okay.

5 One of those is it does have to do with provision  
6 of insurance. I mean, in other words, when you say somebody  
7 is negligent in providing industrial hygiene services and  
8 industrial hygiene services is not insurance, it's something  
9 anybody could provide. They don't have to be an insurance  
10 company to do it and it involved a whole separate realm of  
11 activity and liability, a whole separate basis for liability  
12 and that's the negligence claim.

13 But the bad faith claim, Your Honor, is clearly a  
14 premise on being an insurer. You can't be in bad faith  
15 unless you're in bad faith under your role as a provider of  
16 insurance. And so I just wanted to make sure that that was  
17 understood that one thing that's not going to help in  
18 respect to the bad faith claim is the provision -- is that  
19 we do not take the position that the bad faith claim was not  
20 -- it didn't have to do with provision of insurance.

21 THE COURT: Okay, but --

22 MR. COHN: It's still a question --

23 THE COURT: -- depending upon the side of the  
24 prism through which I choose to view the two different  
25 issues, you would agree that I could reach different results

1 on the motion with respect to the two claims, right?

2 MR. COHN: Yes, you could. Yes, you could. And  
3 but -- and one important aspect of that that I wanted to  
4 point out is that while the bad faith claim is weaker, you  
5 might say, on the provision of insurance argument, it's  
6 stronger than the negligence claim on the plan construction  
7 arguments because the bad faith claim does have to do with  
8 the provision of worker's compensation in terms and when you  
9 look at the bad faith claim and you say, well, wait a  
10 second. How can that be? If it rises from the provision of  
11 insurance, how can it now be within that language that I  
12 just read to you of that it pertains to worker's  
13 compensation coverage?

14 And if it pertains to worker's compensation  
15 coverage, it is excluded from the injunction. So that's  
16 really the only point I wanted to make there.

17 So in sum, Your Honor, I don't know if you were  
18 counting, but basically I gave you five arguments and it's  
19 important for you to understand that if the Montana  
20 plaintiffs prevail on any of the five arguments that the  
21 negligence claim and then of course they also apply to the  
22 bad faith claim, you know, any of those arguments, then the  
23 claims are excluded from the injunction. In other words,  
24 we've given you a number of tasks to get to a result.  
25 They're not cumulative. They're (indiscernible) and if you

1 decide that any of them is persuasive, then first of all,  
2 you may or may not decide to rule on the others. You could  
3 just stop there. But also the point is that from the result  
4 standpoint, in terms of issuing the declaration that we  
5 would see, which is that the Grace channeling injunction  
6 does not bar the Montana plaintiffs from bringing the  
7 negligence claim and the bad faith claim. If we prevail in  
8 any of the five arguments, then we are entitled to that  
9 declaration.

10 THE COURT: I take it -- and I ask the question  
11 now so others may respond but I take it from the submissions  
12 that there's no dispute that this court can enter a final  
13 order on the motions that are now before me.

14 MR. COHN: That is correct. There is no dispute  
15 about that, Your Honor.

16 THE COURT: All right.

17 MR. COHN: And also, by the way, since these are  
18 cross motions for summary judgment effectively, they're  
19 issues of law anyway and so I don't see -- while it makes a  
20 whole bunch of, you know -- while it makes a difference in  
21 what label you put on the order whether it's proposed by  
22 (indiscernible) rulings or just rulings, the standards that  
23 we view are all the same. And so it really just -- I don't  
24 think it matters to anybody and we would all I think want  
25 you to issue a final order. And while we might differ on



1     what the content would be, I'm sure we would all like to  
2     have it issued, you know, issued sooner rather than later  
3     because it is just -- it's inevitable given the amounts that  
4     are at stake here, Your Honor, that it's going to take it up  
5     to at least the level of the 3rd Supreme.

6             THE COURT: Well, I'm often not the last stop  
7     along the line.

8             MR. COHN: Yeah. Well, I always -- I don't know.  
9     I always -- it just seems nicer to say it.

10            THE COURT: And I take no offense at that.  
11     There's a reason there are three levels of appeal above me.

12            MR. COHN: All right. Well, thank you very much,  
13     Your Honor.

14            THE COURT: Thank you.

15            MR. LONGOSE: Good afternoon, Your Honor. May it  
16     please the court, Ed Longose on behalf of Maryland Casualty.  
17     I'd start the argument by talking to some of the points made  
18     by counsel and then perhaps highlighting some of the other  
19     arguments. Obviously this matter's been well-briefed by the  
20     parties and I don't intend to spend the next few minutes  
21     rereading or regurgitating our brief.

22            However, I don't know if it was a Freudian slip or  
23     it is truly what is occurring here and that is when counsel  
24     started his argument he said this case "all arising out of  
25     insurer's wrongdoing", insurer's wrongdoing.

1 Here in this case, it does in fact, everything,  
2 arises out of Grace who is the insurer's wrongdoing. And in  
3 fact, throughout this case, there's been a lot of discussion  
4 about asbestos, whose asbestos, who has control of the  
5 asbestos. And, in fact, there was a discussion and there  
6 has been a discussion about the fact that Maryland Casualty,  
7 never mind manufacturer, supplied or otherwise was involved  
8 in production or distribution of asbestos or asbestos-  
9 containing products or marketing of the product.

10 The plaintiffs' injuries are caused solely by  
11 exposure to asbestos mine mill being distributed by Grace.  
12 That's the claims in this case. At least, that's their  
13 allegation. Plaintiffs' injuries are caused solely by the  
14 fact that Grace was in charge of the mine, was in charge of  
15 what happened in the mine, was in charge of any decisions to  
16 be made in the mine, was in charge of the safety of the mine  
17 workers.

18 There's no evidence or record evidence that the  
19 plaintiffs in this case have brought forward to show this  
20 court that Maryland Casualty had some separate agreement  
21 outside the worker's comp policy or this general liability  
22 policy that they were conducting special services, whether  
23 it be industrial hygiene or engineering or other type of  
24 service.

25 All those service emanated out of the contractual

1 relationship, the delivery of insurance to W. R. Grace. In  
2 fact, the plaintiffs attach two very illustrative exhibits  
3 to their motion. Both exhibits are the policies. One's the  
4 worker's comp policy. One's a CGL policy. And under both  
5 of those policies there's language in there that says that  
6 Maryland Casualty has -- can/has the right to take a look  
7 at, survey, inspect and do all sorts of things relative to  
8 the risk that they're insuring.

9 Those are embedded in the policy and unless  
10 plaintiff comes forward with some type of agreement, special  
11 agreement, side agreement, unbundled agreement or  
12 contractual relationship that says, yes, Maryland Casualty,  
13 we want you to do these services for us and we're going to  
14 pay you to do these services for us, Plaintiff cannot stand  
15 before this court and suggest that these are independent  
16 activities, independent torts or torts unrelated to both the  
17 delivery of insurance and unrelated to Grace's asbestos.

18 Grace always had total control over all aspects of  
19 the mine, mill and processing facilities and Maryland  
20 Casualty could take no actions unless directed to by Grace.  
21 It's plaintiffs' burden to come forward to this court and  
22 provide record evidence in order to get over the hurdle,  
23 which they did talk about and that's the derivative hurdle  
24 which was discussed by Judge Fitzgerald, Judge Buckwalter  
25 and everybody else and we discussed it in our briefs, to

1 show that the activity or the actions by Maryland Casualty  
2 were not derivative of Grace's asbestos or Grace's operation  
3 of the mine or Grace's processing of the mine or Grace's  
4 marketing.

5 Maryland Casualty didn't market, manufacture,  
6 possess or transport Grace's asbestos or anybody else's  
7 asbestos. That, if they did, that would be an independent  
8 tort.

9 As Mr. Lockwood said during the confirmation  
10 hearing, which we cited in our brief, and he represents a  
11 constituency here from which counsel and plaintiffs are  
12 arising from, and that is he was asked what's an example of  
13 an independent tort? And you saw it in our briefs. An  
14 example of an independent tort is something outside of  
15 Grace's asbestos. He gave an example of an automobile  
16 accident where Maryland Casualty or somebody's else's  
17 vehicle as you wish was driving down the street and hits a  
18 pedestrian in a crosswalk. That's something outside of  
19 Grace's asbestos and outside of the statutory construct  
20 here.

21 The other interesting component relative to the  
22 argument and there was a big, long discussion about worker's  
23 comp. And to point, Your Honor, you're right. There are  
24 two counts in this draft complaint that the plaintiffs are  
25 suggesting that this court approve being or that this court

1 suggests is not channeled or not covered by channel  
2 injunction.

3 And the second count, for example, talks about  
4 worker's comp. And the plaintiffs have a whole long  
5 discussion about worker's comp and worker's comp being  
6 carved out, so to speak. However you look at it, the  
7 plaintiffs in this case had every opportunity and should  
8 have maintained the worker's comp case at some point in  
9 time. They were never precluded from doing it. They're not  
10 precluded from doing it now and they would never be  
11 precluded from doing it.

12 Relative to that, if there was a denial of the  
13 worker's comp benefits, then plaintiffs could make their  
14 case statutorily and follow that process. That's all the  
15 claims here are attempting to do relative to count two of  
16 the complaint.

17 With respect to count one of the complaint, that  
18 count, while they disguise it, is still part of the worker's  
19 comp construct and they're still attempting to have it arise  
20 out of the delivery of worker's comp, which would be an  
21 action, statutory action before the appropriate worker's  
22 comp commission.

23 But if you look at that count one, what it does is  
24 it's -- it goes to actions or activities that very well  
25 would be or could be considered under the CGL policy, which

1 is protected, excluded and part of Schedule 5. So  
2 plaintiffs have attempted to draft a complaint that really  
3 is creating a pleading and it's to avoid the application of  
4 the injunction.

5 And I know plaintiffs' reply talks about the fact  
6 that defendants, whether it be Maryland Casualty or CNA  
7 suggest that this issue was decided earlier when the  
8 preliminary injunction was, 12 years ago, 14 years ago, was  
9 put in place. The reason we put that in our brief is  
10 because Judge Fitzgerald -- when Judge Fitzgerald was asked  
11 to extend the preliminary injunction to include insurers and  
12 to include Maryland Casualty, the plaintiffs came up with  
13 the same argument before Judge Fitzgerald. And we recognize  
14 that there's varying standards and the standard in which he  
15 was looking at this -- the court was looking at this is a  
16 more broad-based standard.

17 But plaintiffs came forward -- and I talk about  
18 the constituency, the living plaintiffs, of which Mr. Hutt,  
19 Mr. Osborn are no different. They try to suggest there  
20 weren't around or they weren't making a claim then but it's  
21 the same claim.

22 They came before the court and they suggested or  
23 they opposed the preliminary injunction. And they came  
24 before the court with the same arguments, the same evidence  
25 to suggest that these claims should be separate and apart

1 and should be carved out. They shouldn't be given any type  
2 of injunctive relief and the plaintiffs should be able to go  
3 forward and maintain their cause of action.

4 Judge Fitzgerald did not agree with that and well-  
5 reasoned that and she said based on what was in front of her  
6 and they presented all that evidence and more evidence than  
7 is being presented to this court for the preliminary  
8 junction, said you just don't get there. And fast forward  
9 12 years later, 14 years later, we're standing here not even  
10 with that same body of evidence before this court and  
11 plaintiffs are suggesting that these claims are not  
12 channeled and cannot be channeled because they don't arise  
13 out of Grace's asbestos or Grace's activities at the plant.  
14 They have not, in this case, sustained any type of burden  
15 with respect to the court.

16 Your Honor, just going back to who -- just so it's  
17 clear who Mr. Hutt and Mr. Osborn are, and just for a brief  
18 timeline and I know you have it in the papers but I'll just  
19 briefly talk about that, Maryland Casualty provided  
20 insurance for the facility between 1963 and essentially  
21 1973. But before that time, Royal was providing the  
22 insurance.

23 The plant or the mine and the facility was owned  
24 by (indiscernible). That was purchased by Grace in '63, so  
25 that's why Maryland Casualty assumed the insurance

1 obligations. In '73, CNA came in and took over the  
2 insurance obligations to approximately 1990 or so. The  
3 plant I think was shut down, the mine was shut down  
4 somewhere between '90 and 1993.

5 Mr. Osborn apparently worked in the facility from  
6 19 -- according to the papers, 1960 to 1965 and, just so  
7 this court knows that in -- it wasn't until 1965 that  
8 Montana even recognized asbestos as a compensable disease.

9 Mr. Hutt worked in the facility 1968 to '69 for a  
10 year or so, a little over a year and any of these -- the  
11 suggestion -- it's interesting. One of the exhibits says  
12 Mr. Hutt had a chest x-ray that needed to be looked at and  
13 he needed to be x-rayed thereafter if he remained at the  
14 facility. He didn't remain at the facility, so there wasn't  
15 anything to do with respect to him.

16 But just to give some context to the time period  
17 and what we're talking about, certainly if there was a  
18 disease that manifested itself where there was a workers'  
19 compensation claim to be made by either one of those  
20 gentlemen, they certainly could and should have made it and  
21 there's no evidence that there was any impediment to their  
22 making that claim. That would be under the worker's comp  
23 portion.

24 So we talked about the preliminary injunction and  
25 we talked about the fact that this -- the preliminary



1 injunction was looked at and we look at the history of that  
2 discussion.

3 We get to the point where we go through the  
4 confirmation hearing. Sure, there were objections to the  
5 plan. The living constituents failed to tell the court that  
6 they tried to get or obtain a nice carve out or try to  
7 inject within the plan this whole notion that they could  
8 proceed with these independent torts and try to make that  
9 part of the plan. And, of course, you know, insurers,  
10 particularly Maryland Casualty is going to object to that  
11 because it arose out of Grace's asbestos.

12 But Judge Fitzgerald and Judge Buckwalter both  
13 talked about the fact that if, if the plaintiffs at some  
14 point in the future can show that their claims are not  
15 derivative of Grace's asbestos then they can come back to  
16 the court and prove to the court or show the court how their  
17 independent claims are not derivative of Grace's asbestos.  
18 And both -- their draft complaint, everything in it is about  
19 Grace's asbestos. And you can't play around it or suggest  
20 to this court that it's not when, in fact, that's the very -  
21 - we wouldn't be here but for Grace's asbestos. The  
22 plaintiffs can't have it both ways in that regard.

23 So these arguments have been rejected and it is --  
24 it's curious that in a motion for summary judgment in their  
25 argument that they didn't come to the court and read off of

1 the argument and tell the court how their claims are not  
2 derivative of Grace's asbestos. They didn't do that because  
3 they can't. And I would suggest to the court -- we've cited  
4 in our briefs. The court's probably well -- is  
5 knowledgeable and has read it 100 times and that's that this  
6 is the Pittsburgh Corning case.

7 If there's any case to look at -- that and  
8 Combustion Engineering -- but Pittsburgh Corning, Judge  
9 Fitzgerald, you know, talked about derivative and what's  
10 derivative. And the fact of the matter here is that  
11 Maryland Casualty didn't have anything to do with Grace's  
12 asbestos or delivering that.

13 In those cases, what has happened is you have  
14 somebody who is either manufacturing their own product so  
15 that they may be a joint tortfeasor somewhere along the way  
16 because it's one person's asbestos, another person's  
17 asbestos. You put it together and you've got asbestosis.  
18 We don't have that here and Judge Fitzgerald is very clear  
19 and that case was affirmed. But plaintiff doesn't want to  
20 talk about, you know, this recording, doesn't want to talk  
21 about combustion engineering because they know if they have  
22 to get into a discussion about and sustain their burden --  
23 and that's what they have to do here on summary judgment is  
24 sustain their burden -- that these cases are not derivative  
25 of Grace's asbestos, they can't do that and they haven't

1 done that here.

2 Your Honor, I would just -- you asked an  
3 interesting question and I had looked at the -- and I  
4 focused on the complaint for the most -- in large part  
5 because that's what the plaintiffs are asking this court to  
6 do, to essentially bless, to allow them to go forward. And  
7 it's interesting that first of all the complaint that they  
8 have is very narrow, very focused and to the extent that if  
9 it were ever to be allowed to go forward in any way, shape  
10 or form, it relates to, you know, two employees, you know,  
11 situated as these two employees are. This isn't a complaint  
12 and that's the only thing before the court is that complaint  
13 and this side of the facts relative to that complaint.

14 But I suggest that -- and we suggested that that  
15 complaint can never go forward as constituted. It's  
16 interesting because another complaint, no doubt not very  
17 different, was -- and several of them -- and if you go back  
18 and read Judge Fitzgerald's orders with respect to the  
19 preliminary injunction and the other proceedings, you have  
20 the Gerard complaint, you have Schull, you have Pennock.  
21 These are very similar, very similar.

22 And in that similarity, the plaintiffs for 12  
23 years or 14 years were trying to suggest that they had this  
24 carve out for this independent tort. They never got  
25 traction during the entire 12 to 14 years. They tried once,

1 twice, three times here. They tried to reconstitute the  
2 complaint. They tried to suggest that it was worker's comp,  
3 it was a carve out, there's this. But in no way does this  
4 complaint differ from anything that's been before the court  
5 and where they have not been able to develop any record  
6 evidence to allow this complaint or whatever form of it is  
7 to be non-derivative.

8 One of the complaint, as they talked about,  
9 clearly every count or clearly this complaint in terms of it  
10 is derivative of Grace asbestos and it must be channeled. I  
11 mean, there's no -- I believe there's no discussion with  
12 respect to that.

13 Going back to, as I talked about this recording,  
14 Mr. Lockwood and any other example you could make, the  
15 plaintiffs have not come up with anything independent of  
16 Grace's asbestos. The activities followed here were exudent  
17 of Grace's asbestos.

18 Count two, as I've talked about is -- clearly  
19 deals with worker's comp and they even admitted it deals  
20 with worker's comp and there's no way around worker's comp  
21 being part of this. And to that end, that's a statutory  
22 claim that they could make and what they want to do is  
23 backdoor count two and have this judge and have you, Your  
24 Honor, bless that count two and suggest that that lives  
25 outside of the worker's comp statutory scheme to which we

1 heard is preemptive anyway.

2 So the plaintiffs -- I don't know if they made a  
3 worker's comp claim or if they haven't made a worker's comp  
4 claim. They should have and they can and they have been  
5 able to for the last 12 years. And we've seen no evidence  
6 with respect to that or that it was rejected or that it was  
7 rejected on the grounds that allows them to suggest that it  
8 somehow should be included within our discussion today.

9 Maryland Casualty is an asbestos-protected party  
10 covered by the asbestos channeling injunction. This was so  
11 despite Libby's objection to the plan confirmation. Judge  
12 Fitzgerald rejected the creative pleading by Libby and its  
13 prior efforts to avoid the application and preliminary  
14 injunction. And we sit here and this is where we are today.

15 In terms of where do we go from here, it's  
16 plaintiff's burden on the declaratory judgment act. If, in  
17 fact, and this court if it denies plaintiff's motion, it's  
18 game over as far as the -- as far as we're concerned.

19 In terms of are there other things the court can  
20 do or other things the court may need to see, it's  
21 plaintiff's time for them to come forward with evidence to  
22 show that these are not derivative of Grace's asbestos.  
23 They haven't done that. They haven't suggested that there  
24 is evidence out there they need to obtain. They've not  
25 suggested that there needs to be an evidentiary hearing

1 before the court. And if the court is satisfied that it has  
2 what it needs in front of it absent some additional  
3 evidence, discovery, hearing of some sort, in terms of --  
4 because it's a declaratory judgment action, what we're  
5 asking for is a denial of motion and entry of judgment in  
6 favor of Maryland Casualty. That way we can put to rest  
7 this whole issue regarding whose asbestos it was. It  
8 certainly was not Maryland Casualty's. Thank you.

9 THE COURT: Thank you.

10 MR. COHN: Your Honor, if I may, I'll briefly  
11 reply to those arguments and then it'll be Mr. Giannotto's  
12 turn to go forward on behalf of CNA.

13 THE COURT: Okay.

14 MR. COHN: But I will be brief because much of  
15 what was said had already been really addressed in my  
16 principle argument.

17 What you heard several times over, Your Honor, is  
18 the idea that it's Grace's asbestos and that what it means  
19 to be -- for a claim to be derivative, derivative means  
20 arising from Grace's asbestos. But Mr. Longose didn't say a  
21 word about the actual language of the statute and you'll  
22 recall, Your Honor, that Section 544(g)(2) says the standard  
23 for the debtor to be protected is, if it has anything to do  
24 with asbestos, but that's not the standard under G4. G4  
25 refers to the conduct of or liability of Grace. And that's

1 the standard to be applied. And if someone else has  
2 liability on an independent basis, then the fact that it was  
3 Grace's liability that has caused the injury does not make  
4 that claim adjoinable.

5 So it's -- and, again, just to make it clear on  
6 the issue of, you know, we are talking about cross motions  
7 for summary judgment. We do restipulate, Your Honor, that  
8 the injuries were caused by Grace's asbestos. That's not in  
9 dispute. What is very much in dispute is that that's the  
10 standard of the statute. The statutory language says  
11 otherwise.

12 You also heard again a couple of different times  
13 the notion that we should make a worker's compensation claim  
14 in Montana. Our understanding is that we are barred from  
15 doing so and that the reason that we ended up not being able  
16 to timely -- and when I say we, I'm talking about the  
17 clients at a period when well before they were represented  
18 by counsel -- but the reason they did not timely make a  
19 claim is because they didn't know they had a claim. And the  
20 reason they didn't know they had a claim was because the  
21 dangers of asbestos were suppressed by Maryland Casualty,  
22 which had a duty as their worker's compensation carrier to  
23 have let them know about this kind of harm.

24 Now, if it is the case, Your Honor, that a  
25 worker's compensation claim would still be timely in

1 Montana, that sounds like a pretty good defense to any claim  
2 we might bring for bad faith. But it doesn't have anything  
3 to do with whether this -- with the issue of whether this  
4 was the type of claim that's within or not within the  
5 injunction. This type of claim is not within the injunction  
6 and if we're still entitled to bring a worker's compensation  
7 claim, you know, I mean, which just isn't the case, Your  
8 Honor, but if it were the case, I'm sure that we would hear  
9 from Maryland Casualty in Montana saying what's this bad  
10 faith claim? Just go file your worker's compensation case  
11 and that will lead to the dismissal of the complaint.

12 Excuse me one second. Yeah, and finally, Your  
13 Honor, I just wanted to add that there was an argument that  
14 I actually, under the Grace plan, that I neglected to  
15 mention as to Maryland Casualty, which is a very simple one,  
16 which is that their worker's compensation policies were not  
17 listed in Exhibit 5 of the plan.

18 You asked a good question of what Grace's  
19 intentions were. Well, certainly the failure -- the non-  
20 listing of the worker's compensation policies of Maryland  
21 Casualty in the schedule that listed all of the settlement  
22 asbestos insurance policies not only shows Grace's intent  
23 but also when you track it through the language of the plan,  
24 if it's not listed in Exhibit 5, then the insurer as issuer  
25 of that policy is not protected by the injunction. Thank



1       you.

2                   THE COURT:   Thank you.

3                   MR. GIANNOTTO:   Your Honor, may it please the  
4       court, I'm Michael Giannotto.   I'm counsel for Continental  
5       Casualty Company and Transportation Insurance Company.  
6       Those companies are referred to as CNA in the briefs and all  
7       the arguments.

8                   We have a separate adversary proceeding that's  
9       against 27, what I'll refer to as Libby claimants or Montana  
10      plaintiffs as counsel for these people say.

11                  It's a different type of action in some ways but  
12      in a lot of ways very similar to the first case you've heard  
13      about.   There were complaints filed on behalf of 27 people  
14      exposed in Libby, Montana to Grace's asbestos and they filed  
15      complaints against the CNA.   It's really just the tip of the  
16      iceberg.

17                  We've been told by the Libby, Montana counsel that  
18      he has over 700 other claims he's getting ready to file  
19      depending in large part on how this court rules.

20                  And by way of background, and some background that  
21      wasn't stated in the earlier argument, CNA, like MCC, issued  
22      several liability policies, excess policies, worker's comp  
23      and employer's liability policies to Grace over the years.  
24      And disputes arose over the years as to the extent to which  
25      CNA would be responsible or liable to cover injuries cost to

1 people by exposure to Grace asbestos.

2 And CNA, during the bankruptcy, entered into a  
3 comprehensive settlement with Grace. And pursuant to that  
4 settlement, CNA will be paying \$84 million, or had to pay  
5 \$84 million into the asbestos PI trust. The asbestos PI  
6 trust is the mechanism that's set up by the bankruptcy to  
7 compensate people like the Libby claimants who claim to be  
8 exposed to Grace's asbestos. And we contributed this money.  
9 We settled a lot of defenses on our policies. We paid early  
10 on a lot of excess policies that might never have come due  
11 and we did that because we wanted closure on asbestos  
12 claims. And the way that we got that closure was through  
13 the asbestos PI channeling injunction.

14 And just to make a couple of things clear, in  
15 their papers, the Libby claimants claim a couple of times  
16 that, well, you don't really have to contribute money to the  
17 trust in order to be protected by that channeling  
18 injunction. That is incorrect. You do. CNA has  
19 contributed \$84 million as part of their settlement. MCC,  
20 Judge (indiscernible) found, contributed indirectly through  
21 prior settlements with Grace but you have to contribute on  
22 it.

23 And Libby has sort of implied that we're asking  
24 for some sort of special channeling injunction. We got the  
25 same channeling injunction everyone else got. And it's

1 geared to 524(g), as Mr. Cohn stated.

2 Now, these 27 claims -- and it's important, Your  
3 Honor, when you review this case to review these complaints.  
4 These 27 complaints allege -- and when we say that the MCC  
5 complaints in this respect only exposure to Grace's  
6 asbestos. The plaintiffs -- and to step back a second,  
7 these claimants aren't necessarily workers or former  
8 workers. These are what are called community exposure  
9 claims. Most, if not all of these people -- because the  
10 complaint's a little garbled -- lived in Libby, Montana.  
11 They're not making worker's compensation claims. They're  
12 not even eligible to make worker's compensation claims since  
13 they never worked at the mine or the mill. They're making  
14 what we've called community exposure claims.

15 And what they're alleging is that basically by  
16 living, recreating, whatever in the environs of Libby,  
17 Montana they were exposed to Grace's asbestos that was  
18 emitted by Grace from Grace's facilities and they're --  
19 again, they're not making worker's comp claims but now  
20 they're suing CNA and MCC as part of these 27 claims that  
21 are part of our case as well in tort.

22 And what they're alleging is -- if you really read  
23 the complaint closely, they say, we, CNA, inspected the  
24 Grace facilities. We knew that some workers were sick from  
25 asbestos. And then they don't allege that we actually did

1 anything. They allege we failed to do certain things. We  
2 failed to warn the workers. We failed to educate the  
3 workers. We failed to fix the dust control equipment. So  
4 basically they are suing us because they're sick from what  
5 Grace did and we didn't step in and stop it. And that's  
6 essentially relevant here for two reasons.

7 Commonsense reading of the statute is they are  
8 suing, they are seeking to hold us liable, whether you want  
9 to call it directly or indirectly -- the statute uses both -  
10 - for the conduct of Grace and for the claims against Grace.  
11 That's what they're trying to do. Grace did misconduct.  
12 Grace made these people sick. We issued insurance. We  
13 didn't do anything and now we're liable. They're seeking to  
14 hold us liable for Grace's conduct.

15 The second part of it is that by reason of  
16 provision of insurance, Judge, this is a summary judgment  
17 motion on our behalf and we put in evidence on this. The  
18 Libby claimants did not rebut that evidence. They didn't  
19 ask for discovery. They didn't put in any evidence of their  
20 own.

21 And one of the things we put in were our insurance  
22 policies. And those insurance policies, whether they're  
23 worker's comp policies or they're general liability  
24 policies, give us the right to inspect the Grace facilities,  
25 to make reports and to make recommendations and that's

1 exactly what they're saying the basis of our liability is.  
2 It rises right out of the provision of insurance, right out  
3 of the actual terms of the insurance policy.

4 But there's more than that. We put in scholarly  
5 commentary. Plaintiffs lawyers, defense lawyers, experts in  
6 insurance, federal government studies that say this is what  
7 insurers do. Insurers don't just take premiums and pay out  
8 when someone gets sick. Insurers try to help the  
9 policyholder. Insurers are ultimately going to be legally  
10 liable under their policies if claims are made against the  
11 policyholders. And as part of the provision of insurance  
12 they do inspect. They do make recommendations. That's what  
13 they do. This clearly arises by reason of the provision of  
14 insurance.

15 And in their paper and today, Mr. Cohn emphasizes  
16 the Quigley decision. A couple things, just a footnote,  
17 Quigley did not involve 524(g). It involved a preliminary  
18 injunction but it did involve a preliminary injunction that  
19 used the language of 524(g), so I acknowledge it is relevant  
20 to this hearing today.

21 But whether Quigley was rightly or wrongly decided  
22 it's nothing like this case. In this case, this is what  
23 insurers do. It's part of the insurance relationship. It's  
24 to avoid liability down the road under their policies. It's  
25 totally different from Quigley. Quigley there was no

1 discussion or evidence that parents typically put their  
2 logos on their subs products. A lot of people do that.  
3 When you go to CVS, they put their log on somebody else's  
4 product that's made. It doesn't establish a parent-sub  
5 relationship and that's not necessary.

6 There was nothing to show that parents  
7 overwhelmingly do this in Quigley. But here, this is what  
8 insurers do and it's part of their policies and they do it  
9 because of the potential legal liabilities to pay claims.  
10 This clearly arises out of insurance.

11 And Mr. Cohn points out the Manville case. Okay.  
12 Manville, if you want to construe it very broadly and squint  
13 your eyes and, you know, give them every benefit of the  
14 doubt, yes, Manville could be deemed to support them, but a  
15 bunch of things about Manville. Manville was not a 524(g)  
16 case. It was an injunction issued before 524(g) ever  
17 existed and it was not governed by 524(g).

18 Manville decided the case on non-52(g) grounds and  
19 then said something about 524(g) at the end. But we went  
20 back. Judge, I went back and looked at the briefs both  
21 times before the 2nd Circuit and while there was mention of  
22 524(g) a couple of times in the briefs just to say, you  
23 know, there's a new standard, you know, that doesn't govern  
24 here, there was no extensive briefing or argument about  
25 whether 524(g) applied in that case.

1           And but what's really important is that Manville  
2       did not involve just liability arising out of Manville's  
3       products, out of the debtor's products. People were seeking  
4       to hold Travelers liable because of their exposure to other  
5       companies' products. And, of course, that doesn't derive  
6       from Manville. It's not derivative from Manville.

7           So this is a different case from Manville. And as  
8       Mr. Longose pointed out, and my view, if you want to read  
9       one case, Judge, you should read the Pittsburgh Corning  
10      cases by Judge Fitzgerald. If anyone's handled asbestos  
11      cases, if anyone knows 524(g), it's Judge Fitzgerald.

12           THE COURT: I know. And in my view she retired  
13      too darn soon.

14           MR. GIANNOTTO: And, Judge, the second of the  
15      Pittsburgh Corning decisions was decided after Manville,  
16      after both Manville 3 and 4. It was decided after the lower  
17      court case in Quigley which held the same way that the 2nd  
18      Circuit did and that -- and Judge Fitzgerald still held that  
19      if they're seeking to hold you liable on any theory due to  
20      exposure to the debtor's product, then that is seeking to  
21      hold you derivatively liable. That is liable for the  
22      conduct or claims against the debtor.

23           And Mr. Cohn made an argument today that I don't  
24      think he made in his briefs which is that if you look at the  
25      other categories of people protected under 524(g), it's

1 always the case that the parent can only be liable if the  
2 sub is liable or something like that. But in Pittsburgh  
3 Corning, PPG, the parent or one of the parents of Pittsburgh  
4 Corning, Judge Fitzgerald made this clear. They were sought  
5 to be held liable, not because of piercing the corporate  
6 veil but in some cases they were sought to be held liable  
7 because they failed to correct the deficiencies in the  
8 debtor's product to make it safer. They failed to protect  
9 other people from the debtor's product and that is exactly  
10 what they're alleging here as to us, not that we did  
11 anything but that we didn't do certain things to protect  
12 them from the debtor's asbestos.

13 And, Your Honor, at bottom, what their argument is  
14 is that we are only protected from seeking policy proceeds.  
15 And if that were the case, we wouldn't need the channeling  
16 injunction and we wouldn't need 524(g). We entered into a  
17 settlement with Grace that was approved by the bankruptcy  
18 court and the district court. And once that settlement was  
19 approved we had settled the policies. No one can come after  
20 us for proceeds.

21 The injunction gave us something more than that.  
22 The injunction gave us -- if you look at the legislative  
23 history that we've cited, the injunction was modeled on the  
24 Manville injunction which adjoined all claims related to or  
25 arising out of the policies, not just policy proceeds. And



1 even before 524(g), courts, bankruptcy courts always had  
2 jurisdiction over the proceeds of policies. They could  
3 adjoin suits against the proceeds of policies. They're the  
4 property of the debtor. 524(g) would, therefore, be a  
5 nullity if that's all it protected here.

6 I want to talk a little bit about their theory of  
7 there's an independent tort claim they can make against us.  
8 Again, the only reason we need protection from the  
9 channeling injunction is if they can cobble together an  
10 independent tort claim. If they can't then we win under  
11 state law and it wouldn't matter. And 524(g), again, would  
12 be a nullity. The only time we need this protection is if  
13 they can actually put together a claim. We don't think they  
14 can. We think we can win under state law. There's no  
15 negligence here. There's no duty here. There's no nothing  
16 here.

17 But by making us go to Montana and defend 700  
18 cases, you know, that's what the channeling injunction is  
19 supposed to preclude. On its face, this complaint -- it  
20 only alleges that we give things that derive from Grace  
21 misconduct and that is due to the provision of insurance.  
22 And we should have to go and defend those claims and it  
23 doesn't matter if they can assert an independent cause of  
24 action.

25 Talk a little bit about worker's comp very

1 briefly. Again, most, if not any of these people are  
2 workers in our case. They don't have any basis for a  
3 worker's comp claim. But if they did -- if one of them  
4 happens to be a worker -- and I may be speaking a little out  
5 of school here, but we do have outside in this case some  
6 information given by the Montana counsel on some of these  
7 plaintiffs. At most it appears that one out of these 27 may  
8 have been a former worker. But in any event, they're not  
9 all or most of them aren't.

10 But if any of these people can make a worker's  
11 compensation claim, they can go make it. This claim doesn't  
12 stop worker's compensation claims. Mr. Cohn's arguments  
13 about preemption, they're just irrelevant. The plan divides  
14 claims into two kinds, the kind that's compensable by the  
15 trust, which are tort claims, which are what these people  
16 are making, and worker's -- statutory worker's comp claims.  
17 That's what the plan defines as a worker's comp claim, a  
18 statutory worker's comp claim and those aren't precluded.

19 And so tort claims that are payable by the trust,  
20 you're precluded if you're a protected settled asbestos  
21 insurance company. And worker's comp claims, you're not  
22 because those claims are not payable by the trust and you  
23 need the insurance to pay it.

24 And by the way, I'll just throw in Mr. Cohn  
25 mentioned in his rebuttal to the MCC case that their

1 worker's comp policies aren't listed as settled policies and  
2 we put in our brief -- I'm not going to go through the whole  
3 rigmarole -- ours are. If you look at the brief you'll see  
4 that our worker's comp policies are there.

5 And I just want to end with a couple of points  
6 that they raise in their briefs. These people have remedies  
7 for their injuries. As I mentioned, if they truly have a  
8 worker's comp claim, they can make it. If they truly are  
9 injured, they can go and collect from the trust. And, you  
10 know, the trust was set up and we put the trust distribution  
11 procedures in our papers. Libby claimants who don't -- if  
12 they have no one else to sue but Grace are entitled to an  
13 eight times recovery over the values that other asbestos  
14 claimants are.

15 And the trust also sets up a disease that pays  
16 more than regular plural disease called severe asbestos  
17 plural disease just for the Libby claimants because they  
18 claim that's some disease they have that pays more. So they  
19 can go to the trust and they can get money.

20 And as you can see from the face of the underlying  
21 complaints from CNA and MCC that we've attached to our  
22 complaints, there are other defendants out there that  
23 they're suing and can sue, the State of Montana for failure  
24 to do things at the mine mill and the state supreme court in  
25 Montana has ruled that those cases can proceed against

1 Montana.

2 They allege claims against BNSF Railway for  
3 handling asbestos. They allege against Robinson Insulation  
4 Company. They allege claims against International Paper  
5 Company. There are other defendants out there, so they have  
6 remedies. And there is nothing unfair, Your Honor, about  
7 barring these claims against us. We paid a lot of money, a  
8 lot of money to get out of the Grace asbestos problem. And  
9 if you let them bring us back in, that would be what is  
10 unfair.

11 And, in fact, Mr. Cohn alluded to the fact, and  
12 I'm sure he'll mention this, that we have a partial  
13 indemnity from the asbestos PI trust if we're held liable  
14 for these claims. And, true, it's only a partial indemnity.  
15 When we were negotiating that indemnity we knew that the  
16 Libby claimants were considering bringing these claims post  
17 confirmation. We didn't know how many there would be. We  
18 didn't know what they were worth. We did know, however, how  
19 much we thought was relevant to pay off all legitimate  
20 asbestos claims and we agreed on \$13 million as a partial  
21 indemnity.

22 But Mr. Cohn says this doesn't affect Grace. This  
23 doesn't affect the trust. It affects it a lot more than  
24 this partial indemnity because, Your Honor, their theory  
25 taken to its end would mean that any insurer, whether a CGL

1 insurer or a worker's comp insurer could be sued  
2 notwithstanding their settlement with the trust because  
3 insurers know there are dangers at different places. That's  
4 why people buy insurance.

5 And you could claim a general liability insurer  
6 didn't warn somebody as to something or didn't step in to do  
7 anything. There's no logical conclusion. And what's going  
8 to happen -- and I think one of the reasons the trust has  
9 moved to file an amicus brief is that in the future, not  
10 only in other asbestos bankruptcies but even in this one  
11 because there's still unsettled insurance in this  
12 bankruptcy. Insurers are going to insist on indemnities or  
13 they're going to pay less than they would have otherwise  
14 paid to settle with the debtor. And that's going to mean  
15 less money for people injured by asbestos. It's going to  
16 mean less money in that trust. And that's why this is not -  
17 - that's why it is not unfair to preclude these suits. They  
18 have their avenue of recovery from the trust. This is what  
19 524(g) was aimed at doing.

20 And so with that, I will sit down, unless you have  
21 any questions.

22 THE COURT: I do not. Thank you.

23 MR. GIANNOTTO: Thank you.

24 MR. HORKOVICH: May it please the court, Your  
25 Honor, Bob Horkovich. I represent the WRG asbestos PI

1 trust. We have filed a motion to submit an amicus brief.

2 Your Honor was kind enough to admit me pro hac vice.

3 Libby has opposed our solution of our amicus brief  
4 basically on two grounds. One is that we have no interest  
5 in the institutes that were impartial.

6 THE COURT: Although they say maybe you do. Maybe  
7 there's some argument that you do.

8 MR. HORKOVICH: The --

9 THE COURT: It's the other factors they say just  
10 don't apply.

11 MR. HORKOVICH: Well, the claims come to the  
12 trust. If the channeling injunction's enforced then the  
13 Libby claims would be fought with the trust. And then as  
14 Mr. Giannotto just pointed out, there is \$4.5 million in the  
15 settlement proceeds that CNA is holding back depending upon  
16 what happens with potential settlements with other  
17 outstanding claimants and settlements for judgments and if  
18 they have to pay that in other outstanding judgments it  
19 doesn't come to the trust, otherwise it does.

20 But Mr. Giannotto said -- was perfectly correct  
21 was that the settlements -- insurance is very, very  
22 important to the trust. It's in essence of the \$600 million  
23 asset settlements with scores of insurance companies and  
24 every one of them look for indemnities here. And I echo Mr.  
25 Giannotto's points.

1           It's late in the day. Your Honor has a very full  
2       calendar still yet ahead of him. I don't want to repeat  
3       what's in my brief except to echo what Mr. Giannotto said.  
4       I do agree that the relevant case law would be the 3rd  
5       Circuit decision in Combustion Engineering, the 3rd Circuit  
6       decision in Pittsburgh Corning. I also would like to note  
7       another 3rd Circuit decision which has not been mentioned  
8       today and that's the 3rd Circuit's earlier affirmance of a  
9       preliminary injunction adjoining claims by other earlier  
10      Libby claimants against Maryland Casualty for negligently  
11      undertaking to develop a dust control system and found to  
12      warn of the dangers of Grace asbestos. In Re: W. R. Grace  
13      and Company 115F appellate 565 3rd Circuit 2004, the 3rd  
14      Circuit asserted that the claims were based on the insurance  
15      company's role in working with Grace on a dust control  
16      system in the Libby mine, which it did so as Grace's  
17      worker's compensation carrier therefore arose out of  
18      insurance.

19           With that, Your Honor, if Your Honor has any  
20      questions about my amicus brief or participation, I stand  
21      ready to answer them.

22           THE COURT: Okay. I don't. Thank you.

23           MR. HORKOVICH: Thank you, Your Honor.

24           MR. COHN: Your Honor, I am not going to argue  
25      about the amicus brief but will rest on our papers in that

1 regard. But Mr. Giannotto said some important and incorrect  
2 things.

3 The first, Your Honor, is he did explain what it  
4 was that CNA settled. In fact, that's pretty typical of  
5 what insurers settle when they do a settlement with an  
6 asbestos debtor. Namely, they waive -- they settle defenses  
7 under their policies, so they're presumably not going to  
8 write a check for the fully amount of the policy but they're  
9 going to write a check for the policy minus the, you know,  
10 the risk rewarded value, if you will, of the defenses that  
11 they have.

12 And then also, there's the issue of when you pay  
13 because especially with the excess policies that CNA  
14 settled, they might not have to get paid for a while and,  
15 therefore, you settle on the basis that money now is worth  
16 more than money later. That's what insurers do, Your Honor,  
17 and that's what the statute is designed to have them do and  
18 the statute protects them from any further liability under  
19 their insurance if they do make that kind of settlement.

20 What Mr. Giannotto is looking for -- I'm sorry, I  
21 shouldn't personalize it. What CNA is looking for is a  
22 bonus. What they want is not only to settle their insurance  
23 policies on the same basis that insurers do, you know,  
24 namely the risk adjusted value of the policy, what they want  
25 is a throw-in to be protected from any of the liability for



1 their own independent wrongdoing.

2 The fact that you've had thousands, Your Honor,  
3 insurance settlements in major asbestos cases that seem to  
4 have gone through without any particular difficulty where  
5 insurers settled on the traditional basis of their policies  
6 and have gone off on their merry way, it would seem to  
7 indicate that the system's working just fine as it now  
8 operates.

9 Insurers settle their policies and they're going  
10 to continue to settle their policies. They have no  
11 intention not to settle their policies in any future  
12 asbestos cases. And that's whether or not the particular  
13 insurer has engaged in a tortious conduct in relation to any  
14 -- in relation to any particular plaintiff.

15 They -- why as an insurer would you sit out there  
16 and subject yourself to suit by the debtor or by the  
17 insurance trust of the debtor on your insurance policies  
18 when you can make a rational settlement and walk off with an  
19 injunction? The answer is of course insurers will continue  
20 to settle. They'll walk off with that injunction  
21 protection. They just won't get the bonus, which is not as  
22 earlier argued, permitted under the statutory language  
23 anyway of being protected from specific claims by specific  
24 plaintiffs who have -- who allege tortious conduct on their  
25 party.

1           And I'm not going to respond, by the way, to Mr.  
2           Giannotto's assertions about what CNA did or didn't do.  
3           That's up to us to prove in state court. And we acknowledge  
4           we have to prove they did something. If they didn't do  
5           anything, as Mr. Giannotto said, then I guess we don't have  
6           claims. But that's not our view of it and that's not before  
7           this court. It's property before the state court if and  
8           when we're permitted to bring those to state court.

9           But the statute refers to alleged liability and  
10          this court must follow the allegations of our complaint  
11          against CNA, assume those allegations to be true at least  
12          just for purposes of deciding whether it's the type of claim  
13          that may be adjoined or not.

14          There was mention of CNA's policies being listed  
15          in Exhibit 5 and we're not sure on that, Your Honor, but it  
16          doesn't matter. And the reason it doesn't matter is because  
17          under the language of the plan, in order to be within the  
18          scope of the injunction by the terms of the plan, the policy  
19          must be an asbestos insurance policy, which his listed in  
20          Exhibit 5. The definition of asbestos insurance policy  
21          excludes worker's comp policies. So even if by mistake or  
22          intentionally because it wouldn't matter, a worker's  
23          compensation policy or maybe a larger policy that contained  
24          worker's compensation provisions, were included in Exhibit  
25          5, the insurer is still not a settled asbestos insurance

1 company with a respect to its worker's compensation coverage  
2 obligations.

3 Excuse me one moment, Your Honor. Your Honor, I  
4 will, you know, I will simply conclude on going back to the  
5 fundamental disconnect in the argument that's being made by  
6 both of the insurers, which is that on the one hand they're  
7 arguing that their claims are by reason of worker's  
8 compensation insurance, and then on the other hand saying  
9 that they do not pertain to worker's compensation coverage  
10 within the language of the plan because that takes them out  
11 of the injunction. They can't have it both ways. And on  
12 that, I will thank you very much, Your Honor.

13 THE COURT: Thank you.

14 MR. GIANNOTTO: Your Honor, Michael Giannotto  
15 again. I will be very brief because Mr. Cohn was so kind to  
16 be very brief.

17 Mr. Cohn says and I emphasize too, read the  
18 complaint. They say the complaint says what it says and the  
19 complaint doesn't say that CNA did anything other than  
20 inspect the facility and know there were injuries there.  
21 The complaint alleges that we then didn't do things. We  
22 didn't warn them. We didn't recommend a better dust control  
23 system. We didn't have more medical monitoring. That's  
24 what the complaints say, all seven of them that have the 27  
25 claimants that are attached to our adversary complaint here.

1           You know, the thing about Exhibit 5, I agree in  
2           one sense with Mr. Cohn that whether the policies are  
3           identified on Exhibit 5 is irrelevant. What's relevant here  
4           is whether they're making worker's compensation claims or  
5           claims in the tort system. The tort system claims go to the  
6           trust and were protected from them. The worker's  
7           compensation claims are not payable by the trust and are  
8           payable by insurance.

9           But his point that there was some sort of mistake  
10          or something by identifying these policies is incorrect.  
11          What the statute says -- I'm sorry, not the statute. What  
12          the plan says is that worker's -- policies or portions of  
13          policies aren't covered but solely to the extent they  
14          pertain to rights and obligations or that solely pertain to  
15          coverage for worker's comp claims and worker's comp claims  
16          are defined as statutory worker's comp claims under the  
17          plan. We go through this in our brief.

18          Our what we've referred to as worker's comp  
19          policies don't only provide for statutory -- compensational  
20          coverage for statutory worker's comp claims. They also  
21          provide employer liability coverage, if the employer is  
22          suing tort because of some injury to the employee. They  
23          also provide for inspections and recommendations and things  
24          we've said. And these claims are not for worker's  
25          compensation as defined in the plan, which is statutory

1 worker's compensation benefits. They are for tort damages  
2 in the tort system.

3 As to the bonus argument that Mr. Cohn made, you  
4 know, before these Libby claims, as far as I'm aware, no one  
5 has ever tried to do what they're doing, that is to go  
6 around to the channeling injunction, whether issuing  
7 pursuant to 524(g) or otherwise and to create claims in tort  
8 against settled insurers for failing to have done something  
9 in their role as insurers. So it is not surprising that  
10 people have settled because they didn't think that these  
11 claims would ever go forward.

12 Manville was a different kind of case where there  
13 were different insurers and it was way after the injunction  
14 was issued but it wasn't the debtor's product. So people  
15 did not believe that these kinds of claims would be there.  
16 That's why they are not decisions exactly like this one out  
17 there. And, yes, we did ask for an indemnity as part of  
18 ours because we knew that the Libby claimants here were  
19 making noises that they were trying to do this, so we got a  
20 partial indemnity.

21 But if you decide in their favor here, Your Honor,  
22 I predict that insurers are going to be much less willing to  
23 settle because if they settle at coverage they're still  
24 going to be liable for the whole shebang. So why not fight  
25 out -- why not not pay on the excess policies until 20 years

1 from now when they come due?

2 You know, but one of the reasons they do and  
3 they'll settle more extensively than they otherwise would,  
4 is to get closure and then won't get closure here. Thank  
5 you, Your Honor.

6 THE COURT: Thank you.

7 MR. LONGOSE: Your Honor, if I may make one last  
8 comment.

9 THE COURT: If it's one, yes.

10 MR. LONGOSE: It is. It's not a long run-on  
11 sentence either. I just want to -- I just wanted to add  
12 that -- and I felt just being in the argument that this  
13 consolidated argument and we adopt and incorporate the  
14 arguments from CNA, we had obviously taken some different  
15 arguments, including the discussion of Bailey in that.

16 In that although -- just so the court realizes --  
17 MCC paid large sums of money as well to settle prior to the  
18 bankruptcy and our protection of the plan is the same and we  
19 obtained the indemnity as well. I think that was a short  
20 enough sentence. Thank you, Your Honor.

21 THE COURT: It was. Thank you. Is there anything  
22 further for today?

23 MR. COHN: No, Your Honor.

24 THE COURT: All right. I'll decide the competing  
25 motions in due course and we'll decide the amicus motion at

1 the same time. Thank you all very much. I will say the  
2 presentation both in writing and orally have been extremely  
3 efficient and very helpful to me. So I thank you for that.

4 MR. COHN: Thank you, Your Honor.

5 THE COURT: Court will stand in recess.

6 MR. COHN: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya Ledanski  
Hyde

Digitally signed by Sonya Ledanski Hyde  
DN: cn=Sonya Ledanski Hyde,  
o=Veritext, ou,  
email=digital@veritext.com, c=US  
Date: 2015.11.30 17:36:51 -05'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: November 30, 2015